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No. 496

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

MIDWEST REFRIGERATION, INC., a Corporation,
Petitioner,

vs.

J. F. BATEMAN, J. W. GALBRATH, E. J. DAVIS, JAMES H. MOORE, Statutory Trustees, etc., and STANDARD BRANDS, INC., a Corporation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

PAUL C. SPRINKLE,
Kansas City, Missouri,
OLIVER J. MILLER,
St. Louis, Missouri,
Counsel for Petitioner.

SPRINKLE, KNOWLES & CARTER,
Kansas City, Missouri,
LASHLY, LASHLY & MILLER,
St. Louis, Missouri,
Of Counsel.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

The Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in cause No. 14,106, entitled Standard Brands, Inc. (a Corp.), Appellant, vs. J. F. Bateman etc. et al., and Midwest Refrigeration, Inc. (Third Party Defendant).

JURISDICTION.

The judgment of the Court of Appeals was entered November 13, 1950.

Jurisdiction to issue rests on Title 28, United States Code, Section 1254.

STATEMENT.

This case arises under a petition filed in the name of the Statutory Trustees of Batemore, Inc., a dissolved real estate holding company (R. 17)*, owners of a building in Kansas City, by two fire insurance companies (R. 37) suing (under subrogation), the tenant of the building for a fire loss which they paid to said real estate holding company, following a fire, arising from the explosion of methyl chloride gas which partially destroyed the building.

The methyl chloride gas escaped from an air-conditioning system operated by Standard Brands, Inc., while tenants of the building under lease from said real estate holding company. The suit was based upon their negligence, in permitting the air-conditioning system to become in ill repair, by reason of which the gas escaped. The allegations being that said Standard Brands, Inc., failed, under the terms of the lease, to return the building in as good condition as received, by failing to exercise a high degree of care in keeping, repairing, operating and maintaining said air-conditioning system containing a highly toxic, volatile and explosive gas known as methyl chloride, thereby permitting said methyl chloride gas to escape in dangerous quantities and to ignite and explode (R. 51).

The air-conditioning system was being repaired at the time of the explosion. The petitioner, Midwest Refrigeration, Inc., had sent a pipe fitter, skilled in working upon air-conditioning systems (R. 43), to the building, at the request of the tenant and this man, with the assistance of the tenant's maintenance man, had just completed a few repair procedures, when the compressor head blew off, liberating the methyl chloride gas into the basement where a hot water heater was in operation, and the explosion and fire followed.

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* Record page 17.

Standard Brands, Inc., filed in the cause below a Third Party Petition, alleging in substance that the present petitioner, Midwest Refrigeration, Inc., had been employed by them as independent contractor to repair the air-conditioning system in said building and while doing so did negligently cause and permit the compressor to burst and the methyl chloride to escape. That said Midwest Refrigeration was solely responsible for such escape and its negligence, the proximate cause of the loss, and therefore prayed that any judgment rendered against them be rendered against Midwest Refrigeration (your petitioner here) (R. 10). The answer of Midwest Refrigeration consisted of a denial that they were independent contractors, with a statement that said air-conditioning system was at all times under the sole supervision and control of Standard Brands, Inc., and that third party defendant had no knowledge that said system contained explosive gas and they were merely performing very minor repairs under the direction of defendant's servant and employee. That said explosion was due solely to the conduct of defendants in permitting said system to be in disrepair and to be filled with a dangerous, explosive and inflammable chemical (R. 12).

Plaintiff below did **not** amend its petition so as to accept and proceed against Midwest Refrigeration, Inc., as an additional defendant. Therefore Midwest Refrigeration, Inc., remained solely as an indemnitor of Standard Brands, Inc. (provided they could be common law indemnitor under the applicable local law).

Midwest Refrigeration, Inc., filed a Motion to Vacate and Dismiss the Third Party Complaint (R. 307). The District Court granted this Motion by directing a verdict for Third Party defendant at conclusion of all the evidence (R. 309).

The testimony of Blosser (pipefitter of Midwest Refrigeration, Inc.) showed that Schroeder (maintenance man and engineer for defendant, Standard Brands, Inc.) told him specifically what he was to do in repairing the system, and also what he was **not** to do in repairing it (i. e., not to take apart and inspect the solenoid valves after other valves close by on the same line were found to be clogged). Part of this testimony was denied. But Schroeder did not deny that he told Blosser **not** to remove, inspect and repair the solenoid valve. He also admitted working with Blosser in making some of the specific repairs. Likewise the testimony as between Blosser and Crawford (manager of Standard Brands, Inc.) as to what occurred when he (Crawford) introduced Blosser to Schroeder. According to Blosser, Crawford said to Schroeder: "This is the man from Midwest. You will show him what you want done" (R. 57). This Mr. Crawford denied, saying that: "I told Mr. Blosser that Schroeder would point out the machinery and would help if he needed it" (R. 299).

The trial resulted in a verdict against Standard Brands, Inc., for $39,875.00, from which it appealed to the Court of Appeals.

The Court of Appeals by its judgment affirmed the verdict and judgment against Standard Brands, Inc., but reversed the Court below in directing a verdict for Third Party Defendant, Midwest Refrigeration, Inc., holding that a question of fact arose which should have been submitted to the jury. The Court of Appeals said:

> "The evidence is in conflict upon the question of independent contractor" (Opinion p. 13) (R. 347).
>
> "The fundamental difficulty . . . is that it assumes a question of fact, that is, that Midwest was not an independent contractor . . ." (Opinion p. 17) (R. 351).

"We hold that order to be erroneous" (entering a verdict for Midwest).

"If the jury should find under proper instruction that Midwest was employed as an independent contractor, then it is liable to defendant" (R. 351).

"For the foregoing reasons the judgment for Midwest is reversed . . ." (R. 353).

It is important in consideration of the question to be presented, to understand that the case falls into the general category of the handling of inherently dangerous materials. This was recognized by the Court of Appeals in its opinion when it said:

"Any operation where methyl chloride is present was shown to be dangerous just as an operation involving gasoline or gun powder is dangerous unless precautions commensurate with their nature are observed" (Opinion p. 5) (R. p. 345).

"It (Standard Brands, Inc.) knew that a dangerous refrigerant was in use and its duty was to exercise care commensurate with the known danger" (Opinion p. 8) (R. p. 343).

It must also be recognized that the undisputed testimony shows that during the making of the repairs to the air-conditioning system, the defendant, Standard Brands, Inc., was then in possession of the building, was conducting a business therein, with a maintenance man (Schroeder) employed who was in charge of maintenance in the building under a manager (Crawford) who was directly in charge of all equipment. That Schroeder helped Third Party Defendant Midwest's pipefitter to make the repairs and did direct him not to take off and inspect the solenoid valves, even after foreign material was found clogging the valves close by (R. 63-64). This is undisputed. It is shown that this had an important and proxi-

mate relationship to the escape of the methyl chloride gas (R. 93, 98). The solenoid valve was afterwards found to be defective.

It must also be remembered that this refrigeration system was not wired in standard fashion. The solenoid valves were actuated by electrical connections which could not be disconnected by cutting the main switch which stopped the compressor. This was unknown to Midwest Refrigeration, Inc., and was not explained to its pipefitter (R. 93, 104, 286, 287). He assumed a standard hook-up, when he made the repairs. This unusual hook-up could not be detected by ordinary inspection (R. 104). It also played a proximate and direct part in causing the escape of the methyl chloride gas (R. 93). Midwest did not work on methyl chloride systems because of the danger (R. 104). Blosser did not know that methyl chloride was in use until part of the system had been taken apart, when he discovered it. He continued to complete the repair work however.

SPECIFICATION OF ERROR.

1. The Court of Appeals rendered an erroneous decision when it held, contrary to applicable local law, that Midwest Refrigeration, Inc. (Petitioner here), could be an independent contractor of defendant Standard Brands, Inc., under the law.

(a) As a necessary proposition it also follows that the Court rendered an erroneous decision when it held that the lower Court should have submitted the facts to the jury from which such a legal relationship might arise.

2. The Court rendered an erroneous decision when it held, contrary to applicable local law, that Midwest Refrigeration, Inc., was a common law indemnitor of the defendant Standard Brands, Inc.

(a) As a necessary proposition it follows that the Court rendered an erroneous decision when it held that a question of fact arose from which such a relationship could be found by the jury.

3. The Court rendered an erroneous decision when it held, contrary to applicable local law, that there could be contribution between joint tortfeasors even though there was no joint judgment.

REASONS FOR GRANTING THE WRIT.

1. There is a conflict between the opinion and decision of the United States Court of Appeals for the Eighth Circuit and the applicable local law in the following respects:

(a) Under the local applicable law there can be no relationship of independent contractor and contractee between petitioner and Standard Brands. This was found to be true by the Trial Court. But the Appellate Court remands the case upon a statement that

> "If the jury should find that Midwest was employed as an independent contractor, then it is liable to defendant" (R. p. 351).

The various decisions of the Supreme Court of Missouri cited by petitioner are to the effect that in the handling of dangerous substances the relationship cannot arise.

In Salmon v. Kansas City Dist. Co., 241 Mo. 1, 39 L. R. A. (N. S.) 328, the Court said:

> "The relationship of owner and independent contractor is thereby prevented."

In Manus v. Kansas City Dist. Co., 228 Mo. A. 905, 74 S. W. (2) 506, l. c. 509, the Court said:

> "The relationship of independent contractor cannot legally exist."

See also Mattan v. Hoover, 350 Mo. 506, 166 S. W. (2) 557.

(b) The relationship between them cannot be that of common law indemnitor and indemnitee, to permit Standard Brands to recover their loss from Midwest because

(even though Standard Brands may not themselves be negligent) the acts of Midwest in making the repairs even though negligent are imputed to Standard Brands in the handling of dangerous substances.

This was found to be true by the Trial Court but reversed by the Appellate Court when they said that

> "No instruction was given on the issue of responsibility of an agent to his principal for damages caused by the agent's negligence for which the principal was responsible."

The various decisions of the Missouri Courts are to the effect that in such cases the negligence of the agent is imputed to the owner, making the owner himself guilty of such acts.

In the case of Markowitz v. Metropolitan St. R. R. Co., 186 Mo. 350, 69 L. R. A. 389, the Court said:

> "The ultimate of that doctrine is that the party to whom the negligence is imputed actually participated in the act of negligence—and is then charged with it—"

In Haynie v. Jones, 233 Mo. S. 948, 127 S. W. (2) 105, the Court said in effect that:

> "Defendant in legal contemplation was actually driving the car, the driver being merely the instrument through which it was being done."

In Williamson v. Fisher, 50 Mo. 198, the Court said:

> "The defendant was bound to know the width of his lot; and if he (by failure to disclose it to his contractor) becomes a party to an encroachment upon—his neighbor, by which his house is destroyed; he is a

co-trespasser, and is liable as though he made the excavation."

In all cases of imputation the person to whom the acts are imputed becomes thereby guilty of contributory negligence as a matter of law in any attempt at recovery for his loss. The Supreme Court of Missouri in Hodge v. Feiner, 338 Mo. 268, 90 S. W. (2) 90, approved the McKerall v. St. L. S. F. R. R., 257 S. W. 166, which said:

"The negligence of the driver was imputed to the plaintiff making her contributorily negligent."

See also Dinger v. Burham, 228 S. W. (2) 696 and 285 Fed. 97, 67 L. Ed. 1212.

This is supported by the Restatement of the law of Agency:

"If the principal authorizes a tort either advertently or inadvertently he cannot recover for harm resulting to him for it—the agent is subject to no liability to his principal." Vol. 2, p. 914.

An owner has a duty to inform the contractor of conditions which might produce tort liability, as set out in Williamson v. Fisher, supra (50 Mo. 198). In a like case the Supreme Court of Alabama said that the owner had the duty to warn and

"if as a proximate result of the breach of this duty (a trespass occurred) under stated principles of the common law the owner is liable as joint tort feasor with the contractor." Belcher Lumber Co. v. Woodstock Land & Mineral Co. (1943), 245 Ala. 5, 15 S. W. (2) 625.

The well established exception to the rule that where the work to be done under the contract is inherently dan-

gerous, then the responsibility cannot be shifted or delegated to an agent.

The basis of the rule being that the owner must see to the guarding of the work himself. Mallory v. Wilson Ice S. Co., 6 S. W. (2) 625; Carson v. Blogett Const. Co., 189 Mo. App. 120, 174 S. W. 447; Neal v. 12th & Grand Ave. Bridge Co., 70 S. W. (2) 136, 228 Mo. App. 536.

(d) Finally the rule has been laid down by the Supreme Court of the United States in Union Stock Yards v. Chicago, etc. R. Co., 196 U. S. 217, 49 L. Ed. 453.

> "There can be no indemnity in favor of a joint tort feasor, sued for or compelled to pay damages, as against one whose fault is of equal grade and similar in character.
>
> "Where two parties acting together commit an illegal or wrongful act, the party who is held responsible in damages cannot have indemnity or contribution from the other, because both are equally culpable—and the damage results from their combined acts.
>
> "In the present case the negligence of both parties has been of the same character—both contributed to same injury."

This was held to be a matter of law—not of fact—since the matter came up to the Supreme Court upon the granting of a demurrer to a petition below.

CONCLUSION.

Certiorari should be granted to review the judgment of the Court of Appeals, since this third party defendant should not be compelled to undertake another trial before a jury in the lower court upon an erroneous interpretation of the local law by the Court of Appeals, after the lower

court correctly applied the local law originally in directing a verdict in favor of your applicant.

Respectfully submitted,

PAUL C. SPRINKLE,
515 Lathrop Building,
Kansas City 6, Missouri,
OLIVER J. MILLER,
705 Olive Street,
St. Louis 1, Missouri,
Counsel for Petitioner.

Of Counsel:
SPRINKLE, KNOWLES & CARTER,
515 Lathrop Building,
Kansas City 6, Missouri,
LASHLY, LASHLY & MILLER,
705 Olive Street,
St. Louis 1, Missouri.

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REPLY BRIEF OF STANDARD BRANDS, INC., TO PETITION FOR A WRIT OF CERTIORARI, to the United States Court of Appeals for the Eighth Circuit.

FOWLER HAMILTON,
52 Wall Street,
New York, New York,
ALBERT THOMSON,
JOHNSON, DAVIS, THOMSON,
VANDYKE & FAIRCHILD,
311 Commerce Building,
Kansas City, Missouri,
Attorneys for Standard Brands, Inc.

SMITH-GREIVES, LAW PRINTERS, KANSAS CITY, MO.

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